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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 439

BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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[redacted]
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Butchers Union Local No. 127.

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Petitioner respectfully prays that a Writ of Certiorari issue for a review of the decision of the Court of Appeals for the Ninth Circuit entered in this case on May 23, 1967, enforcing an Order of the National Labor Relations Board.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix A hereto, *infra*, at page i along with the Court's Decree. The Board's findings of fact, conclusions of law and order are reported at 152 N.L.R.B. 1645 (1965).

JURISDICTION

The decision of the Court of Appeals was entered on May 23, 1967; a stay pending this petition was entered on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Where the Regional Director of the Board offers a Settlement Agreement to the charged parties, and the charged parties fully execute and perform all of the terms thereof so that nothing is left of the dispute, can the Regional Director, upon mere subsequent reflection and contrary to the Board's well-established rules, as approved by this Court, repudiate the Agreement?

(2) Where the unfair labor practices charged against the Union and Company raise the question of whether employees were required involuntarily to join the Union before the expiration of the thirty (30) day grace period in §8(a)(3) of the Act (29 U.S.C. 158(a)(3)), and where the Trial Examiner has not made findings on the critical issue of volun-

tariness, has the Court of Appeals by granting enforcement of a Board order which envisions repayment of dues and initiation fees to possibly as many as 250-300 unknown, unnamed employees sanctioned the use by the Board of an assumption that employees do not want to join a union within the 30 days, an assumption which is nowhere authorized by law, nowhere supported by *any* record evidence or findings, and indeed contrary to the explicit statutory guarantee that an individual is free to join a union at any time he wants?

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, hereinafter called the "Act," are set out in Appendix B hereto, p. xi f. and specifically include §§ 7, 8(a)(1), (2) and (3), 8(b)(1)(A) and (2) of said Act. Sections 557(c) and 706 of the Administrative Procedure Act, 5 U.S.C.A., are set out in Appendix C hereto. Sections 101.7 of the Statement of Procedure and 102.45 of the Rules and Regulations of the National Labor Relations Board are set out in Appendix D hereto.

STATEMENT OF THE CASE

On July 22, 1963 one Madeline Ritchey filed an unfair labor practice charge on behalf of herself "and others" (R. pp. 3-4).[1] The charge involved the respondent Company and Union in alleged violations

[1] "R" refers to the record reference used below and to the Clerk's Transcript thereof being filed with the Court. "R II" will refer to Volume II thereof.

of §8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act by the requirement that Mrs. Ritchey "and others" pay their dues and initiation fees before the expiration of the 30-day grace period in §8(a)(3) of the Act. The case was assigned by the Regional Director of the Board to Board Agent Dean Francis (R. p. 19).

The ensuing correspondence between Agent Francis and the attorney for the Union establishes the Settlement Agreement. The pertinent correspondence is set out in Appendix E hereto, p. xviii f. (G.C. Ex. 16A, 16C, 16G; R. U. Ex. 5, 6, 7, 8 and 10.) The particular matters to be emphasized in this correspondence are that while the proposed Settlement Agreement was originally made subject to the approval of the Regional Director, the subsequent correspondence was free of any such condition. In addition, the correspondence indicates that the Regional Director's office knew, at the time it proposed the Settlement Agreement, that there may have been "others" involved besides the charging party. The Union advised Agent Francis that it would sign upon the understanding that no violation would be claimed with respect to any other employees. The Board agent assured the Union, unequivocally, in writing, under date of August 27, 1963, that:

> "Your understanding, as expressed in your letter of August 26, that upon the execution of this Settlement Agreement there will be no claimed violation with respect to any employees employed up to the time of the expiration of the settlement is *correct.*" (Emphasis added; R. U. Ex. 5.)

Thereupon the correspondence shows that the Union executed the Agreement and the Notice to All Members. The Company likewise returned its executed Settlement Agreement and Notice (R. Co. Ex. 3 and 5). Mrs. Ritchey was reimbursed immediately for her first month's dues (R. p. 24), and the Regional Director's Office allowed the Notices to be posted, reading in large letters "Pursuant to a Settlement Agreement approved by the Regional Director of the Twentieth Region. . . ." (G. Co. Ex. 16 D); and the system whereby dues and fees had previously been collected was in fact changed (R. II, p. 153). Silence only was forthcoming from the Regional Office for some 20 days; at that time the cryptic letter of September 20, 1963, Appendix E, p. xxvii, *infra,* was received by the respondents, informing them that because of "additional matters" having come to the Region's attention, the Settlement Agreement was being withdrawn.

A new charge, called a "First Amendment," was then filed by Ritchey on November 1, 1963, identical in terms with the original, being again solely on behalf of Ritchey "and others" (R. p. 5). Already believing that a settlement had been effected under the above facts, respondents refused to enter another settlement, and a complaint issued from the Regional Director (R. p. 6).

The complaint was directed to the hiring process. The forms given the applicant were an application form and an "Employee's Voluntary Declaration" containing a check-off authorization (R. p. 19). The

applicant was also informed that his initiation fee would be deducted from his third and fourth weekly paychecks along with his first month's dues. The Union contended that whatever the practice was, the witnesses had joined the Union voluntarily. The Trial Examiner did not reach this phase of the case inasmuch as he found that there had been a Settlement Agreement. On the basis of the testimony of the eight witnesses, and without the aid of its Trial Examiner, the Board found, however, that not only had these witnesses been required to join the Union in violation of the 30-day grace period, but that the practice was illegal as to unknown, unnamed and unnumbered others, possibly 250-300 (R. p. 54). The Board's remedy in this regard is detailed in the Decree of the Court of Appeals and directs a remedy for the 250-300 employees it believes to be involved (R. pp. 82 and 84).

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS SANCTIONED THE REPUDIATION OF A SETTLEMENT AGREEMENT AND THE SUBSEQUENT ISSUANCE OF A COMPLAINT BY THE REGIONAL DIRECTOR, ACTS WHICH WERE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND BEYOND THE JURISDICTION OF THE REGIONAL DIRECTOR. IN SO DOING THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER CONFLICTING WITH A DECISION OF THIS COURT AND SANCTIONED ADMINISTRATIVE ACTIVITY SO FAR DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF BOARD PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

There is no question but that settlement agreements have an established place in the formal Statements of Procedure of the National Labor Relations Board, Series 8, as amended; §101.7 thereof covers the subject and is set out in Appendix D of this Brief. There is no question but that the Board has a long-standing policy and decisional rule whereby it will honor its agreement unless there is a failure to comply with the agreement or independent, unfair labor practices. *United Dairy Co.*, 146 N.L.R.B. 187; *Tompkin Motor Lines*, 142 N.L.R.B. 1; *Corn Products Refining Co.*, 22 N.L.R.B. 824; *Matter of Wickwire Bros.*, 16 N.L.R.B. 316; *Matter of Godchaux Sugar*, 12 N.L.R.B. 568; *N.L.R.B. v. Superior Tool & Die Co.*, 309 F. 2d 692 (C.A. 6, 1962).

Over the years the Board has maintained the same policy behind its many decisions. Thus the Board said in *Shenandoah-Dives Mining Co.*, 11 N.L.R.B. 885, 888:

> ". . . we believe that effective administration of the Act requires that the Board's agents have the respect and confidence of labor organizations and employers with whom their work brings them in contact. Repudiation of agreements entered into and relied on in good faith necessarily impairs such respect and confidence. . . . We believe the policies of the Act will best be effectuated by giving effect to the agreement and refraining from consideration of the alleged unfair labor practices."

It was in reliance on this long-standing policy and rule of the cases that the Settlement Agreement was entered into; it was in spite of this long-standing authority that the Board repudiated the Agreement. The Settlement Agreement was drawn up by the Board; it was the Board's proposal; and it envisioned settlement of the entire charge: the Board would not claim violations with respect to any other employees besides Mrs. Ritchey.

The reasons assigned by the Board for this repudiation were: (1) the Regional Director had never approved the Agreement because he had never actually signed the forms previously executed by the respondents, and (2) "additional matters" had come to the attention of the Regional Director.

With respect to the latter, the Board told the Court of Appeals that the "additional matters" which had just come to its attention were "facts showing that respondents' unlawful arrangement affected more employees than charging party Ritchey." (G. Co. Brief,

p. 17.) This incredible statement is belied by the appended correspondence wherein Board Agent Francis demonstrates that the Regional Office was aware from the very beginning of more employees who were possibly affected by the challenged practice (Appendix E, p. xxiii). The Board cannot credibly point to "additional matters" which were unbeknown to its Regional Director. *Jackson Mfg. Co.*, 129 N.L.R.B. 460.

With respect to the excuse that the Regional Director had never actually signed the Agreement, the respondent argued to the Court of Appeals that:

(1) The argument wholly confuses "approval" with "signature," and §101.7 of the Board's rules merely refers to the "approval" of the Regional Director.

(2) The Board itself has said that it is bound by the representations and material undertakings of its duly designated and responsible agents. *Sherry & Gordon Co., Inc.*, 107 N.L.R.B. 113. The Trial Examiner, well-versed in the practical operations of the Board, noted that the Regional Director is presumably in touch with his staff on a daily basis. Since this was the Regional Director's offer of settlement, not the respondents', presumably Agent Francis reviewed the matter with the Regional Director before offering it to the respondents. Otherwise, we must conclude that Agent Francis was at all times acting without authority.

(3) The repudiation based on the failure of the Regional Director actually to sign the Agreement

reverses a prior decision of the Board itself in at least one similar case, *Sherry & Gordon Co., Inc., supra.* The Board's field examiner had led the parties to believe that the Regional Director had approved the withdrawal of charges, which was the final component of a settlement agreement. The respondent Union paid back wages and granted membership to the charging party in accordance with the settlement. In seeking to set it aside, the Regional Director disclosed that he had never signed the withdrawal. The Board disagreed and found that this was "improper procedure" and would "diminish public confidence in the administration of the Act." "Approval" was not equated with a "signature of approval." The narrow position of the Board constitutes new precedent, a major change in administrative policy and in its dealings with the bar and the public.

(4) The narrow basis asserted for repudiation is without support in prior case law and is contrary to established policy as specifically approved by this Court. In *Wallace Corporation v. N. L. R. B.*, 65 S. Ct. 238, 323 U. S. 248, 89 L. Ed. 216 (1944), this Court gathered together a number of the Board's cases and stated:

> "'To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. [Footnote omitted.] The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. . . . It has consistently gone behind

> such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. [Footnote omitted.] We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned." *Id.* at p. 241.

Manifestly the Settlement "ended" the labor dispute and "extinguished all the elements giving rise to it." The Settlement called for reimbursement of Ritchey; this was done. It called for Notices; these were executed and posted by the Respondents, and the system for collecting dues and fees was in fact changed. There was nothing left of the dispute. There were no "subsequent events" which "demonstrated that efforts at adjustment have failed to accomplish their purpose."

The Regional Office was in possession of all the facts; there were no undisclosed facts, either before or after the Agreement; the amended charge was identical in all material respects. No one else has to this day come forward to file a charge or assert their own interest. After more than three years all the Board knows now, and indeed it knew it at the time it sent the Agreement to the respondents, is that "possibly as many as 250-300 employees" were processed. (R. p. 54.) The Board's action in this case is wholly without precedent, wholly beyond its stated purposes as codified in its own decisions and as approved by this Court in *Wallace, supra,* p. 241.

To all of this the Court of Appeals simply said that the necessity for a signature was a policy matter for the Board, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 85 L. Ed. 1271 (1941), and that there was no arbitrary departure from settled administrative practice such as to warrant judicial intervention, *Sunbeam Television Corp. v. F. C. C.*, 243 F. 2d 26 (D.C. Cir. 1957). Contrary to the holding of the Court of Appeals, the cited Board cases and decision of this Court in *Wallace, supra,* have established a clear, long-standing rule whereby the Board would not equate approval with a simple signature and would not set aside a settlement agreement except for certain stated, well-known reasons, and absent those reasons, certainly never where the parties had already acted on the representations of its responsible agents.

The Court of Appeals, however, mistakes the petitioner's position. The petitioner does not challenge the policy-making authority of the Board and, contrary to the Court's opinion, does not challenge the wisdom of "approval" by the Regional Director's actual signature, if properly done. What is challenged is the tardy determination, in this case, first by the Regional Director, and then by the Board that approval means nothing less than a signature, a determination without precedent and contrary to the previous policy and above-cited decisions, and a determination obviously used to recoup what the Regional Director upon long delayed second-thought deemed an unauspicious settlement. The repudiation was, under the circumstances,

arbitrary, capricious, an abuse of administrative discretion, and made without observance of that procedure required by law. That is, as was argued to the Court of Appeals, if the Board wished to change its policy in support of its Regional Director, it should have done so prospectively only. *N.L.R.B. v. Majestic Weaving Co.*, 355 F. 2d 854 (C.A. 2, 1966); *N.L.R.B. v. Atkinson*, 195 F. 2d 141 (C.A. 9, 1952); *Madden v. International Org. of Masters, Mates, etc.*, 259 F. 2d 297 (C.A. 7, 1958); *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 366 F. 2d 126 (C.A. 9, 1966, concur. opin.); 5 U.S.C.A. §706.

The Court of Appeals has missed the importance of the Regional Director's action to the Administration of the Act. The Trial Examiner himself well-noted the grave problems surrounding the relationship of the Board to the labor bar and to the public, if it is able to avoid its commitments by the conduct involved here (R. p. 35). The implications of this case for the public and the labor bar in dealing with the Board's Regional Director run well beyond the context of settlement agreements and color the confidence in the Board's every agent, representation, and function. Under the circumstances, this was a completely arbitrary departure from settled administrative practice, requiring judicial intervention.

The resultant complaint issued by the Regional Director of the Board was also beyond the Board's jurisdiction. The filing of a proper charge is a jurisdictional prerequisite to the issuance of a complaint by the Regional Director, *N.L.R.B. v. National Lic-*

orice Co., 60 S. Ct. 659, 309 U. S. 350, 84 L. Ed. 799 (1940). In light of the settlement, there was no vital charge on which the Regional Director could issue a complaint.

The vague allegation "and others" in each of the charges was too vague to preserve the validity of the charge, as the Board itself has recognized in the analogous situation of *Mid-States Steel & Wire Co.*, 112 NLRB 800. The first amendment charge had only form, not substance, and was void (R. p. 5). The only specific allegation of illegality in the charge was dated April 17, 1963; the amendment charge having been filed October 31, 1963, the six-months statute of limitations in §10(b) had run. Such arbitrary and unauthorized conduct alone calls for the review of this Court.

II

THE DECISION AND ORDER OF THE BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

With respect to the witnesses who testified, the Union contended that they had joined the Union voluntarily. They testified that they read the check-off authorization card which was captioned "Employee's Voluntary Declaration" at the time they signed it (R. p. 19). The legality of the check-off provisions in the contract is admitted. Some of the employees had previously belonged to other unions and presumably fully wanted to belong again. Those few who in fact

complained of the procedure to the Company or Union prior to the filing of the unfair labor practice charge involved in this litigation, such as witnesses Young and White, were in fact reimbursed. The Company's secretaries had no instructions if someone complained, because complaints had simply never before occurred. There was no evidence of coercion but rather of a whole atmosphere of voluntary practice which had simply gone unquestioned (R. II, p. 162). No findings were made by the Trial Examiner on this issue of voluntariness, but the Board made such finding even for the 250-300 "others."

The Trial Examiner's Decision is part of the entire record before the reviewing court. *Universal Camera Corp. v. N.L.R.B.*, 71 S. Ct. 456, 340 U.S. 474, 95 L. Ed. 456 (1951). Pursuant to §102.45 of the Board's Rules and §557(c) of the A.P.A., his Decision is to contain findings and conclusions, and the reasons therefor, upon all material issues of fact, law or discretion presented on the record. In this case the Board performed that function without even a remand. Credibility findings are part of the record. *Universal Camera, supra,* at p. 469. Even inferences can be drawn from conduct not otherwise in serious dispute. For example, the witnesses testified they were told they would have to join the Union. In the total context did this mean now or at some time in the future? The Board had before it only words; the Trial Examiner had observed the witnesses and would have had "a more accurate feel . . .," *N.L.R.B. v. Majestic Weaving, supra,* for the inferences to be drawn.

Implicit in the holding of the Board and the Court of Appeals is the administrative assumption by the Board that employees do not really want to become union members until they really have to. Section 7 of the Act gives the employee the right to join of his own free will at any time; there is no statutory assumption, nor authority for it, such as is implicit in the Board's position with respect to the 250-300 unknown and unnamed employees. If the Board contends that this is another policy determination whereby the Board is authorized to effectuate the policies of this Act (§10(c)) and pursue the public interest, how is the policy of the Act furthered, and the public interest served, by engaging in an assumption which is on its face, flagrantly contrary to the clear guarantee, contained in the same Act, of a right to join at any time? The assumption and findings of the Board are without substantial evidence in the record as a whole. This Court is asked to review such a determination which sanctions without evidence, an assumption directly contrary to the clear language of the Act and the decisions of this Court from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 563 (1937) through innumerable cases in this Court to date.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the writ of this Court be issued.

Dated, San Francisco, California,
July 17, 1967.

Respectfully submitted,
CHARLES P. SCULLY,
Attorney for Petitioner
Butchers Union Local No. 127.

(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. CAMPBELL SOUP COMPANY and BUTCHERS UNION LOCAL 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, *Respondents.*	No. 21,297

[May 23, 1967]

On Petition to Enforce an Order of the National Labor Relations Board

Before: MERRILL and BROWNING, Circuit Judges, and TAYLOR, District Judge

MERRILL, Circuit Judge:

This case is before the court upon petition of the National Labor Relations Board to enforce its order issued against respondent on June 16, 1965, following proceedings under §10(c) of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.* The Board's decision and order are reported at 152 N.L.R.B. 1645 (1965).

The Board found that respondent company, by requiring newly hired employees to join respondent union immediately, as a condition of employment, by furnishing new employees with union cards, by deducting union dues and initiation fees from the employees' pay during the first thirty days of employment[1] and

[1] §8(a)(3) permits an employer, pursuant to agreement with a union, to require union membership "after the thirtieth day following the beginning of such employment."

forwarding these deductions to the union, thereby assisted the union in violation of §8(a)(2) and (1) of the Act. The Board found that the company and the union, by jointly engaging in a practice whereby newly hired employees were required to join the union and pay union dues and initiation fees during the first thirty days of employment, violated §8(a)(1), (2) and (3), and §8(b)(2) and (1)(A) of the Act.

The Board's order directs respondents to cease and desist from checking off union dues for employees pursuant to membership dues checkoff authorizations, unlawfully obtained from the employees prior to the thirty-day statutory period, and from in any like or related manner interfering with employees in the exercise of their §7 rights, and to post the usual notices. The Board further ordered respondents, jointly and severally, to reimburse all employees hired within six months[2] prior to the time the charge was filed in this case for their first month's dues, and to reimburse those employees who, during the same period, paid initiation fees but worked less than thirty days for the initiation fees so deducted.

The union challenges the Board's finding of an unfair labor practice, asserting that the newly hired employees voluntarily joined. In our judgment the Board's finding is supported by substantial evidence.

The union's main attack is upon the Board's order that reimbursement apply to all employees hired within the time limits specified in the order. It contends that the remedy of reimbursement should be limited to the one employee who filed the unfair labor practice charge with the Board.

The union first contends that the charges filed were not broad enough to encompass any conduct other than that which occurred in the case of the charging individual. We do not so read the charges. They were that "Madeline Ritchey and others" had been "required" or "caused" to become members of the union as a condition of employment, and that "by these and other acts" respondents had "coerced and restrained employees" in violation of §7 of the Act.

The union's principal contention is that the order is contrary to an agreement of settlement reached by the Board and the

[2] 29 U.S.C. §160(b) (1964) precludes a Board complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

union, which limited reimbursement to Madeline Ritchey. There is no question but that such was the nature of the agreement as proposed by the Board's field examiner and acceded to by the union, and that this proposal was the express subject of an exchange of correspondence. The trial examiner found that an agreement had been reached.

The Board's ruling to the contrary was based upon the fact that the agreement had not been approved in writing by the Board's regional director, but instead had been rejected by him for the reason that without extending reimbursement to all those ultimately covered by the Board's order, a complete remedy for the unfair labor practice would not be provided.

The field examiner, in forwarding a copy of his proposed settlement agreement, had stated that it was being recommended by him "subject to the approval of the regional director." Settlement agreements are the subject of NLRB Statement of Procedure §101.7, which expressly states that agreements are "subject to the approval of the regional director."

The union vigorously contends that it is unwise to stand upon the requirement of approval and to construe that requirement as for approval in writing. It echoes the views of the trial examiner, who ruled that the proposed agreement should bind the Board; he reasoned that a contrary rule would impart an undesirable degree of uncertainty to settlement negotiations and discourage negotiation in the field.

The Board, however, found other considerations to be more impelling. It stated:

> "We reject the trial examiner's conclusion that there are 'any number of ways' in which the regional director can give his approval to a settlement agreement. In our opinion it is necessary that the regional director expressly approve in writing the offered settlement in its totality after all disputed issues are resolved. Anything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effectuated, as in the instant case."

Such policy decisions clearly are within the broad discretion of the Board.[3] The question here relates to the wisdom of the rule

[3]"Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding un-

in the public interest rather than to the injustice of strict construction in a particular case. Further we do not find here a completely arbitrary departure from settled administrative practice, such as has been felt to warrant judicial intervention. *Cf., Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (D.C.Cir. 1957).[4]

The company attack on the Board's order is directed to the fact that the company has been made responsible for reimbursement jointly and severally with the union. It should instead, it contends, have been made secondarily responsible. The present order, it asserts, may well result in unjust enrichment of the union, and to permit the union thus to enrich itself can hardly be said to accomplish the purposes of the Act.

We are not unsympathetic with the company's position and certainly the Board could have provided secondary responsibility had it so chosen. The choice, however, remains that of the Board, and it is clear that the choice of joint and several liability is available to the Board when both the union and the employer had engaged in the discriminatory practice. *NLRB v. Newspaper and Mail Deliverers Union*, 192 F.2d 654 (2d Cir. 1951); *Union Starch and Refining Company v. NLRB*, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951); also *cf., NLRB v. Pinkerton National Detective Agency*, 202 F.2d 230 (9th Cir. 1953). We would have a different case if the company had strongly resisted the imposition of this practice by the union. See *NLRB v. Lexington Elec. Products Co.*, 283 F.2d 54 (3d Cir. 1960).

The order is entitled to enforcement. So ordered.

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consciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[4]The Board itself, in past cases, has recognized the policy considerations noted by the trial examiner, but the force given to them has depended on the circumstances of the particular case. *Sherry & Gordon Co.*, 107 N.L.R.B. 113 (1953); see also *United Dairy Co.*, 146 N.L.R.B. 187 (1964); *Tomkin Motor Lines, Inc.*, 142 N.L.R.B. 1 (1963); *Jackson Mfg. Co.*, 129 N.L.R.B. 460 (1960); *Corn Products Refining Co.*, 22 N.L.R.B. 824 (1940); *Wickwire Bros.*, 16 N.L.R.B. 316 (1939); *Godchaux Sugars, Inc.*, 12 N.L.R.B. 568 (1939); *Shenandoah-Dives Mining Co.*, 11 N.L.R.B. 885 (1939). All prior cases are distinguishable from the case before us, and we disagree with the union's contention that there existed any established rule contrary to that here announced. Arbitrary disregard of this rule in the future would present a different question. See *Burinskas v. NLRB*, 357 F.2d 822 (D.C.Cir. 1966).

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Campbell Soup Company and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Respondents.	No. 21,297

DECREE

Before: Merrill and Browning, Circuit Judges, and Taylor, District Judge:

This Cause came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent, Campbell Soup Company, Modesto, California, its officers, agents, successors, and assigns and Respondent, Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, its officers, agents, and representatives on June 16, 1965. The Court heard argument of respective counsel on April 10, 1967, and has considered the briefs and transcript of record filed in this cause. On May 23, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Ninth Circuit that:

A. The Respondent, Campbell Soup Company, Modesto, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Contributing support to Butchers Union Local No. 127, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), or any labor organization, by its practice of informing prospective and/or newly-hired employees of the requirement that employees must join the Union immediately, furnishing prospective employees with application for membership cards and initiation fees and dues checkoff authorizations, and deducting the said dues and initiation fees and paying the same over to the said Union, prior to the 30-day statutory grace period following employment.

(b) Requiring prospective or newly-hired employees to execute membership-dues-checkoff authorization cards for the aforementioned Union, or any other labor organization, prior to the expiration of the 30-day grace period provided for in Section 8(a)(3) of the National Labor Relations Act, as amended, (hereinafter called the Act).

(c) Checking off union dues for employees pursuant to membership-dues-checkoff authorizations unlawfully obtained from employees prior to the 30-day statutory period.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the aforesaid Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Jointly and severally with the Respondent Union, reimburse all employees for moneys illegally exacted from them, in the manner and to the extent set forth in the section of the Board's Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to determine the amount of the moneys illegally exacted from the employees involved.

(c) Post at its plant in Modesto, California, copies of the attached notice marked "Appendix A." Copies of such notice, to be furnished by the Regional Director for Region 20, (San Francisco, California) shall, after being duly signed by its authorized representative, be posted by the Respondent Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in (c) above, and as soon as they are forwarded by the aforesaid Regional Director, copies of the Respondent Union's notice herein marked "Appendix B".

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent Company has taken to comply herewith.

B. The Respondent, Butchers Union Local No. 127, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause the Respondent Company to discriminate against prospective and/or newly-hired employees by requiring them to execute membership-dues-checkoff authorizations for

the above-named Union, or any other labor organization, prior to the expiration of the 30-day grace period provided for in Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Company, reimburse all employees for moneys illegally exacted from them, in the manner and to the extent set forth in the section of the Board's Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all membership, dues, and other records necessary to compute the moneys illegally exacted from the employees involved.

(c) Post at its business offices and meeting halls in Stockton, California, copies of the attached notice marked "Appendix B." Copies of said notice, to be furnished by the said Regional Director, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt

thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the said Regional Director signed copies of Appendix B for posting by Respondent Company at its Modesto, California, plant, as provided above. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by Respondent Union's representative, be forthwith returned to the said Regional Director for disposition by him.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps it has taken to comply herewith.

Endorsed, Decree Filed and Entered

/s/ Wm. B. Luck
Wm. B. Luck
Clerk

[A True Copy

Attest:
Wm. B. Luck
Clerk]

Appendix B

NATIONAL LABOR RELATIONS ACT, AS AMENDED

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage mem-

bership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Appendix C

ADMINISTRATIVE PROCEDURE ACT, TITLE 5, U.S.C.A.

Sec. 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited

by a party, and due account shall be taken of the rule of prejudicial error."

Sec. 557(c)

"(a) . . .

(b) . . .

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) Findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

Appendix D

NATIONAL LABOR RELATIONS BOARD
STATEMENT OF PROCEDURE

Sec. 101.7. *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

NATIONAL LABOR RELATIONS BOARD
RULES AND REGULATIONS

Sec. 102.45 *Trial examiner's decision; contents; service; transfer of case to the Board; contents of*

record in case.—(a) After hearing for the purpose of taking evidence upon a complaint, the trial examiner shall prepare a decision. Such decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act. The trial examiner shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the trial examiner's decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the trial examiner's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

Appendix E

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

August 23, 1963

Charles P. Scully, Esq.
Suite 1108-1120 David Hewes Bldg.
995 Market Street
San Francisco 3, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Sir:

In accordance with telephone conversations this date with the parties, I am enclosing copies of the proposed Settlement Agreement and Notice for your perusal and signature. I want to note that the proposed Settlement Agreement is based upon my opinion and is being recommended by me subject to the approval of the Regional Director.

The Charging Party, Mrs. Ritchey, worked more than 30 days (4-18 to 6-3-63) and therefore, in accordance with *Cadillac Wire Corp.*, et al. *128 NLRB 1002,* where there is a lawful union-security clause, would not be entitled to a refund of her initiation fee,

but is entitled to a refund of the amount of her first month's dues—$4.00—which was deducted on 5-5-63.

Although there is some evidence indicating that there may be other employees or former employees who might be entitled to participate in the remedy called for in this case, please note that the Settlement Agreement, as proposed, when agreed to contemplates extension of the remedy only to the Charging Party.

Please sign and date the original and one copy and mail them to this office by *Tuesday, September 3, 1963.* A self-addressed, postage paid, envelope is enclosed for your convenience. Absent a Settlement Agreement in this case, I will recommend on *9-4-63* that a complaint issue.

Thank you for your cooperation. If you have any questions concerning this matter, please contact me immediately.

Very truly yours,
/s/ Dean H. Francis
Dean H. Francis
Field Examiner

Encl:
(Emphasis added).

August 26, 1963

Mr. Dean H. Francis
Field Examiner
National Labor Relations Board
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters and Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

This will acknowledge your letter of August 23, 1963 and the enclosed Settlement Agreement with respect to the above matter.

In your letter you indicate the possibility of other employees being involved, but do not disclose their identity by name. As far as I am concerned, however, I believe this is immaterial because it is my understanding that upon the execution of this Settlement Agreement, there will be no claimed violation with respect to any employees employed up to the time of the execution of the settlement. If I am in error in this respect, I would appreciate being advised since, as you know, it is our position that the Union in no way caused or required the form to be signed by the employees and the form was presented to them by the employer but not as the agent of the Union.

I have forwarded the documents to my clients for their consideration and if satisfactory, I assume they

will sign and return them to me in the immediate future, at which time I will then forward them to you. *I do, however, have some concern with the third paragraph of the notice which would indicate an admission of illegal conduct in contradiction of the disclaimer in the Settlement Agreement itself. It would be my suggestion that you would consider the rewording of that, so as to remove any concept of admitted illegality.* In addition, it would appear that the reference to the 3-day in the last line of the first paragraph may be a typographical error also.

Very truly yours,
Charles P. Scully.

CPS:mb
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo

(Emphasis added).

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

August 27, 1963

Charles P. Scully, Esq.
Suite 1108-1120 David Hewes Bldg.
995 Market Street
San Francisco 3, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Sir:

Enclosed you will find a copy of Form NLRB 4031 Notice to all Members. Please substitute this Notice for the one sent to you on August 23, 1963. You will note that the typographical error in the last line of the first paragraph referring to a "3-day" grace period is corrected to read "30-day." Thank you for your letter of August 26, 1963 noting the error.

In connection with the suggestion in your August 26, 1963 letter, concerning the possibility of rewording the last paragraph of the Notice to remove the inference of legality, I do not feel the Regional Director will object to dropping the word "illegal." *You will note; therefore, that the paragraph has been reworded and the offending word "illegal" deleted.*

Your understanding, as expressed in your letter of August 26, that upon the execution of this Settlement Agreement there will be no claimed violation with respect to any employees employed up to the time of the expiration of the settlement is correct.

Very truly yours,
Dean H. Francis /s/
Dean H. Francis
Field Examiner

Encl:
(Emphasis added).

August 28, 1963

Mr. R. Lautermilch, Secretary
Butchers Union Local No. 127
1024 Bank of America Bldg.
Stockton, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Lautermilch:

Enclosed you will find a revised NOTICE TO ALL MEMBERS which should be signed and returned to us, *since in view of the accompanying letter from Mr. Francis to me, a copy of which is enclosed, I believe you will see that it is a final and complete determination as to all pending disputes and simply involves the repayment of one month's dues.*

I suggest, however, that in the 5th line of the first paragraph, you insert a zero after the numeral "3" so that it appears "30 days" and initial that on the margin opposite the correction.

If you have any questions, please contact me.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: *Messrs. Dean Francis*
Max J. Osslo
SF Office

(Emphasis added)

August 28, 1963

Mr. Dean H. Francis
Field Examiner
National Labor Relations Board
Twentieth Region
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

I am forwarding the signed Settlement Agreement and duplicate copy to you herewith, so that you may proceed, and you will note by attached copy of letter to Mr. Lautermilch that I have forwarded the amended Notice to him for execution.

Immediately upon the return of the signed Notice, it will be forwarded to you.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo

August 30, 1963

Mr. Dean H. Francis
National Labor Relations Board
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

Enclosed you will find the executed copy of Notice in the above matter, which is being transmitted in accordance with the understanding contained in your letter of August 23, 1963.

You will note that we have made the corrections in the first paragraph and assume this is satisfactory.

If there is anything further to be done please advise.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo
(Emphasis added).

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

September 20, 1963

Mrs. Madeline Ritchey
1025 Conejo
Modesto, California

Campbell Soup Company
375 Memorial Avenue
Camden, New Jersey
Attn: D. H. Springer

Charles P. Scully, Esq.
Suite 1108-1120
David Hewes Building
995 Market
San Francisco 3, California

Attn: Victor Van Bourg, Esq.

Re: Campbell Soup Company
Case No. 20-CA-2780
Amalgamated Meat Cutters
and Butcher Workmen of
North America, Local 127
Case No. 20-CB-1116

Dear Madame and Gentlemen:

Additional matters relating to the above cases *have been brought to our attention.* The settlement proposal previously submitted is withdrawn and further investigation will be made.

If you have any questions concerning this matter, please call or write.

Very truly yours,
Dean H. Francis /s/
Dean H. Francis
Field Examiner

(Emphasis added).

October 1, 1963

National Labor Relations Board
Twentieth Region
830 Market Street
San Francisco 2, California

Attention Mr. Dean H. Francis
Field Examiner

Re:

Campbell Soup Company—No. 20-CA-2780—and
Amalgamated Meat Cutters and Butcher Workmen
of North America, Local 127—No.20-CB-1116

Dear Mr. Francis:

This will acknowledge receipt of your letter dated September 26, 1963, enclosing a revised settlement agreement and notice.

As we have previously indicated to you in rather certain terms, we will not recommend such a settlement to our clients, and believe that any settlement should run only towards the charging party and towards no other person, particularly since we are dealing with the question of a subjective state of mind on the issue of voluntariness.

Accordingly, unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case.

Very truly yours,
Charles P. Scully
By Victor Van Bourg

VVB:cb
OPE-3-afl-cio
cc: Messrs. Osslo
Lautermilch
(Sf and Stockton)

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 439

BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iv) is not yet officially reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 16-45, 51-62)[1] are reported at 152 N.L.R.B. 1645.

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[1] "R." refers to "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of the unfair labor practice hearing;

JURISDICTION

The decision of the court of appeals was rendered on May 23, 1967 (Pet. App. i). The petition for a writ of certiorari was filed on July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the Board correctly held that its Regional Director had not approved a proposed settlement agreement of unfair labor practice charges filed against petitioner union.

2. Whether the Board's finding that the union required, in agreement with the employer, that employees join the union and pay dues and initiation fees prior to the expiration of their first 30 days of employment, in violation of Section 8(a)(3) of the Act, was supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Board's Rules and Regulations, are printed in Pet. App. xi-xvii.

"G.C. Exh." refers to the NLRB General Counsel's exhibits; and "Res. Exh." refers to the respondent Union's exhibits. These documents comprised the record in the court of appeals, and certified copies thereof have been filed with the petition.

STATEMENT

A. The Board's Findings of Fact

1. *The unlawful requirement of union membership and dues*

Since 1956, Campbell Soup Company[2] and petitioner union have entered into a series of collective bargaining contracts, each containing a lawful union-security clause providing that new employees must join the union after the 30th day of their employment (R. 52).[3] The practice established by agreement between the company and union, however, was to require new employees to join the union at the time they were first employed and, further to require the payment of dues and initiation fees prior to the 30-day grace period provided by the Act (R. 20, 52; G.C. Exhs. 13, 14, Tr. 156-170). Thus, following a physical examination and other preliminaries, each employee applicant was asked by the company's personnel clerk whether he was a member of the union. If not, he was informed that he would have to join and was simultaneously handed membership applica-

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[2] The company was co-respondent with the union before the Board and court of appeals.

[3] Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to encourage union membership by discrimination in employment conditions, but provides in pertinent part "That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment * * *."

tion and "voluntary" dues deduction forms, which he was told to sign. He was further informed that the union initiation fee was $25 and monthly dues were $4 and that, therefore, the company would deduct $14.50 from his third and fourth weekly paychecks (R. 19, 20, 52; Tr. 31, 54, 74, 78, 81, 98, 103-104, 120; G.C. Exhs. 4-12).

All employee-applicants immediately signed the union forms submitted to them, it being understood by them as well as the company and union that this was one of the conditions of employment (R. 52, 53). Thus, the company personnel clerk told applicant Young that she "would have to join the union in order to go to work" (Tr. 53-54). When applicant White asked the clerk whether it was compulsory to sign, she was told that "this is the way that they did it" (Tr. 31). Applicant Alami "signed the forms I had to sign" because "I thought that was my only choice" (Tr. 74, 78). The union's business agent, Weborg, came to the company office once a week to pick up the list of newly-hired employees and their union application forms (Tr. 136). Also, as they had been told by the company, the employees' union initiation fees and dues covering their first month of employment were withheld from their third and fourth weekly paychecks (R. 52; G.C. Exh. 2). Weborg told the company, prior to each employee's third week of employment, what amounts should be withheld (Tr. 127-128).

Madeline Ritchey applied for employment with the company on April 18, 1963[4] (R. 19; Tr. 103). Fol-

[4] All subsequent dates are in 1963.

lowing the usual procedure, the company personnel clerk told her that there was a union in the plant and gave her the union membership application and dues checkoff forms for signing. Ritchey executed these, and the usual amounts were deducted from her third and fourth weekly paychecks (R. 19, 20; Tr. 103-105, G.C. Exh. 2, p. 4, G.C. Exh. 11). On June 3, Ritchey was lawfully discharged. Thereafter, on two occasions, she phoned the union office to return the dues and initiation fees deducted from her paychecks, but was told that none of the money was returnable since she had worked more than 30 days (R. 20; Tr. 105-106). On July 22, Ritchey filed unfair labor practice charges against the union with the Board's Regional Director, alleging that the membership and dues practices followed by the company and union with respect to her and other employees violated the Act (G.C. Exh. 1(c)).[5]

2. *The Regional Director's rejection of the proposed settlement*

The case was assigned to a Labor Board Field Examiner for investigation,[6] and shortly thereafter, on August 12, the company and the union ceased requiring employees to join the union and pay dues and initiation fees within 30 days of their employment (R. 52, 33; Tr. 161-162). On August 23, in accordance with Section 101.7 of the Board's Statements of

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[5] Similar charges were filed against the company (G.C. Exh. 1(a)). See n. 9, *infra*.

[6] See Sec. 101.4 of the Board's Statements of Procedure, 29 C.F.R. 101.4.

Procedure, 29 C.F.R. 101.7,[7] the Field Examiner wrote to the union (Pet. App. xviii) concerning possible disposition of the case by informal settlement. After noting the enclosure of "copies of the proposed Settlement Agreement and Notice for your perusal and signature," the Field Examiner stated:

> I want to note that the proposed Settlement Agreement is based upon my opinion and is being recommended by me subject to the approval of the Regional Director.

Similarly, the enclosed proposed Settlement Agreement (R. 39) provided that "the undersigned * * * Union and charging party * * * in settlement of the above matter, and subject to the approval of the Re-

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[7] Section 101.7 provides:

> *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

gional Director * * *, hereby agree as follows"; that "Upon approval of the Agreement, the Union will post * * * copies of the notice attached hereto * * *"; and that "Performance by the Union with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director. * * *" The proposed agreement contained blank spaces for the signatures of the "Union," the "Charging Party," the "Board Agent" who "Recommended" the Agreement, and the "Regional Director" who "Approved" it.

In discussing the substantive terms of the proposed agreement (Pet. App. xviii), the Field Examiner further stated that the charging party, Ritchey, would be entitled to a refund of her first month's dues but, since she had worked more than 30 days, would not be entitled to the refund of her initiation fee. He then added that, although there was some evidence that other employees might be entitled "to participate in the remedy called for in this case, please note that the Settlement Agreement, as proposed, when agreed to contemplates extension of the remedy only to the Charging Party." On August 26, the union asked the Field Examiner about the meaning of the proposed remedy (Pet. App. xx), and on August 27, the Field Examiner replied (Pet. App. xxiii): "Your understanding * * * that upon execution of this Settlement Agreement there will be no claimed violation with respect to any employees up to the time of the expiration of the settlement is correct."

By early September, the union had signed the proposed settlement agreement, and Ritchey had been

reimbursed $4 for her first month's dues. But the Regional Director refused to approve the proposed agreement, because it provided a remedy only for Ritchey, although all newly hired employees had been subjected to the same unlawful practice. Accordingly, the proposal was withdrawn on September 20, and a new one was submitted on September 26, providing for reimbursement of unlawfully withheld dues and initiation fees to all employees hired after January 22, 1963[8] (R. 53-54; Res. Exh. 10, G.C. Exh. 16 (F)). On October 1, the union's counsel rejected the new proposal, stating (R. 25-26; G.C. Exh. 16(G)):

> As we have previously indicated to you in rather certain terms, we will not recommend such a settlement to our clients, and believe that any settlement should run only towards the charging party and towards no other person, particularly since we are dealing with the question of a subjective state of mind on the issue of voluntariness.
>
> Accordingly, unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case.

The Regional Director then issued the instant complaint.

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[8] January 22 was chosen as the cutoff date because Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" and Ritchey filed her charges on July 22 (G.C. Exh. 1(c)).

B. The Decisions of the Board and of the Court of Appeals

Upon the foregoing facts, the Board concluded that no settlement agreement had been reached which precluded the issuance of the instant complaint. The Board found that, in the circumstances of this case, the union in fact recognized that the settlement first proposed by the Field Examiner was "tentative," had "to be submitted to the Regional Director for approval," and "had not been approved by the Regional Director" prior to its withdrawal on September 20. Moreover, the Board held that, in order to avoid "possible confusion and misunderstanding as to whether or not a settlement has been effectuated," "it is necessary that the Regional Director expressly approve in writing the offered settlement in its totality after all the disputed issues are resolved." (R. 53-54.) Finally, the Board found on the merits that the union had violated Section 8(b)(2) and (1)(A) of the Act, by its practice with the company of requiring that new employees, as a condition of employment, join the union and pay dues and initiation fees prior to the expiration of the 30-day statutory period (R. 52-53, 56).[9] The Board's order, *inter alia*, required the union to cease and desist from the unfair labor practices

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[9] The Board also found that the company violated Section 8(a)(1), (2) and (3) of the Act by "telling applicants for employment that they had to join the Union," submitting to them membership applications and authorizations for dues deduction, and deducting such fees, all prior to the 30-day statutory period (R. 53, 56). These findings, which were affirmed by the court of appeals, are not challenged by the union here, but see the company's companion petition, No. 525, O.T., 1967.

found; to reimburse employees hired within six months prior to the filing of the unfair labor practice charges [10] for dues deducted for the first month of their employment; and to reimburse the initiation fees of those who had not worked more than 30 days (R. 55, 58-59).[11]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. i-iv).

ARGUMENT

The decision of the court of appeals, which turns on the special facts of this case, is correct and is not in conflict with the decision of any other court of appeals. There is no occasion for further review.

1. As this Court has held, "With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices." *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 253. In Section 101.7 of its Statements of Procedure, 29 C.F.R. 101.7, the Board has provided for the consideration of settlements before any complaint is issued. This

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[10] See n. 8, *supra*.

[11] As the Board pointed out (R. 55), "all employees who worked more than 30 days would have paid [initiation] fees pursuant to the lawful union-security clause" and, therefore, they were not entitled to reimbursement of such fees.

A similar order was entered against the company; its reimbursement obligation was made joint and several with the union's (R. 55, 57-58). The company is challenging the order against it in its pending petition in No. 525.

provision expressly makes all such settlements "subject to the approval of the regional director," who, as the Board noted (R. 54), "has a duty to review each proposed settlement with a view toward assuring that the public interest as well as the private rights of the immediate litigants are served." Following this procedure here, the Field Examiner proposed a settlement agreement to the union, expressly making it subject to the approval of the Regional Director. The Regional Director rejected the proposal because it did not provide a complete remedy for the unfair labor practice committed by the union. Accordingly, the Board quite properly determined that no settlement had been reached which precluded the issuance of the instant complaint.

The union's principal contention (Pet. 7-9)—that the settlement proposed here was entered into with the implicit approval of the Regional Director and that his subsequent action therefore constituted an improper repudiation of the agreement—is unsupported by the facts of record. As shown in the Statement, *supra*, pp. 5-8, the Board's Field Examiner carefully pointed out to the union at the outset of negotiations on August 23 that the proposed settlement was "based upon my opinion and is being recommended by me subject to the approval of the Regional Director." The proposal itself expressly provided in numerous places that it was subject to the Regional Director's approval and provided a space for his signature as well as that of the Field Examiner. The further communication of record from the Field Examiner to the union pertained to the meaning of

the proposed remedy and in no way indicated that the Regional Director had approved the agreement (Pet. App. xxii).[12] And there was no communication between the Regional Director himself and the union. Finally, when the proposed settlement was withdrawn on September 20 and a new one substituted on September 26, the union in no way suggested that the Regional Director was thereby repudiating an agreement which he had already approved. Instead, its attorneys asserted (Pet. App. xxix) that the broader remedy provided in the new proposal was not acceptable and that, "unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case." In these circumstances, the Board was amply warranted in finding that the Regional Director had in no way approved the original proposal and that the union in fact recognized this at all times.[13]

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[12] Indeed, in discussing the wording of the proposed notice to be posted by the union, the Field Examiner said, "I do not feel the Regional Director will object to dropping the word 'illegal'" (Pet. App. xxii), thereby clearly indicating that the agreement had not yet been approved by the Regional Director.

[13] The union's reliance on *Wallace Corp.* v. *National Labor Relations Board, supra,* and the Board decisions cited on p. 7 of the petition, is misplaced, since in those cases the Regional Director admittedly had approved the settlement, the issue being whether the Board was thereby precluded from considering the unfair labor practices embraced by the settlement.

Equally inapposite is *Sherry & Gordon Co., Inc.,* 107 N.L.R.B. 113 (Pet. 9-10), where the Board's Field Examiner expressly "informed the Respondent Union's counsel that the Regional Director had approved the withdrawal of charges"

2. If these findings were proper, the union cannot complain (Pet. 9-13) about the Board's further holding that the only appropriate method by which the Regional Director may give his approval to a settlement agreement is to sign it in writing. In any event, this requirement is admittedly (Pet. 12) within the Board's "power to fashion its procedure" for the "settlement of disputes" (*Wallace, supra,* at 253); as the Board noted (R. 54), "[a]nything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effectuated * * *." Nor was the union prejudiced by the requirement of a signed writing here. The settlement proposal was embodied in one of the Board-prepared forms referred to in Section 101.7 of the Board's rules; it was expressly made subject to the Regional Director's approval; and the only method of approval indicated was the provision of a space at the end for the signature of the "Regional Director" under the word "Approved" (R. 40).[14]

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in accordance with the proposed settlement agreement. *Id.*, at 113-114, 115. As shown above, no such representation was made by the Field Examiner here.

[14] The requirement of the Regional Director's signature does not constitute a reversal of the Board's decision in *Sherry & Gordon Co., Inc., supra,* as the union contends (Pet. 9-10). There the Board merely held that it would not stand on this requirement where a Board agent expressly represents that the Regional Director has in fact given his approval. See n. 13, *supra.* Here no such representation was ever made.

Contrary to the union's further suggestion (Pet. 14), the Section 10(b) limitation period (see n. 8, *supra*) is calculated from the date of the original charge and not the

3. The union's contention on the merits (Pet. 14-16)—that the newly hired employees *voluntarily* joined the union and paid dues and initiation fees prior to the expiration of the 30-day statutory period—raises a mere "substantial evidence" question which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. Moreover, the record facts summarized in the Statement (*supra*, pp. 3-5) amply support the Board's finding, sustained by the court below (Pet. App. ii), that the employees did not act voluntarily, but were compelled as a condition of employment, in violation of Section 8(b)(2) and (1)(A) of the Act. Accord: *National Labor Relations Board* v. *Cadillac Wire Corp. and Local 810, Teamsters*, 290 F. 2d 261 (C.A. 2), enforcing 128 NLRB 1002, 1005-1006.[15]

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amended charge, where, as here, the amended charge does not introduce a new cause of action. *National Labor Relations Board* v. *McCloskey & Company, Inc.*, 255 F. 2d 68, 70-71 (C.A. 3); *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413 (C.A. 10).

[15] There is no merit to the union's contention (Pet. 15) that the Board, having reversed the Trial Examiner on the settlement issue, was required to remand the case to him for his findings on the merits. While the Trial Examiner did not make any ultimate findings on the merits, he did hold a complete hearing thereon. And it is well settled that the Board may "make its findings and predicate its orders upon the written record without hearing the witnesses testify or availing itself of findings and recommendations prepared by the officer who heard and observed the witnesses testify." *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 453 (C.A. 3). Moreover, 5 U.S.C. 557(b) provides that where, as here,

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1967.

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there is an appeal to the agency from the "initial decision, the agency has all the powers which it would have in making the initial decision. * * *" Finally, the Trial Examiner did make many subsidiary findings upon which the Board relied, and the record evidence itself was largely undisputed and raised no substantial credibility question.

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SUPREME COURT, U. S.

AUG 21 1967

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 525

CAMPBELL SOUP COMPANY and BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners respectfully pray that a Writ of Certiorari issue for a review of the decision of the Court of Appeals for the Ninth Circuit entered in this case on May 23, 1967, enforcing an Order of the National Labor Relations Board.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix A hereto, *infra*, at page i along with the Court's Decree. The Board's findings of fact, conclusions of law and order are reported at 152 N.L.R.B. 1645 (1965).

JURISDICTION

The decision of the Court of Appeals was entered on May 23, 1967; a stay pending this petition was entered on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Where the Regional Director of the Board offers a Settlement Agreement to the charged parties, and the charged parties fully execute and perform all of the terms thereof so that nothing is left of the dispute, can the Regional Director, upon mere subsequent reflection and contrary to the Board's well-established rules, as approved by this Court, repudiate the Agreement?

(2) Where the unfair labor practices charged against the Union and Company raise the question of whether employees were required involuntarily to join the Union before the expiration of the thirty (30) day grace period in §8(a)(3) of the Act (29 U.S.C. 158(a)(3)), and where the Trial Examiner has not made findings on the critical issue of volun-

tariness, has the Court of Appeals by granting enforcement of a Board order which envisions repayment of dues and initiation fees to possibly as many as 250-300 unknown, unnamed employees sanctioned the use by the Board of an assumption that employees do not want to join a union within the 30 days, an assumption which is nowhere authorized by law, nowhere supported by *any* record evidence or findings, and indeed contrary to the explicit statutory guarantee that an individual is free to join a union at any time he wants?

(3) Where Company and Union have jointly participated in an unfair labor practice consisting of checking off Union dues prior to the 30 day statutory period, and Company has paid all of such deducted dues to Union, may the Board fashion a remedy which makes Company jointly and severally liable with Union for reimbursement of said dues to the affected employees?

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, hereinafter called the "Act", are set out in Appendix B hereto, p. xiii f. and specifically include §§ 7, 8(a)(1), (2) and (3), 8(b)(1)(A) and (2) of said Act. Sections 557(c) and 706 of the Administrative Procedure Act, 5 U.S.C.A., are set out in Appendix C hereto. Sections 101.7 of the Statement of Procedure and 102.45 of the Rules and Regulations of the National Labor Relations Board are set out in Appendix D hereto.

STATEMENT OF THE CASE

Company accepts and adopts the statement of the case contained in Union's petition and incorporates it by reference.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS SANCTIONED THE REPUDIATION OF A SETTLEMENT AGREEMENT AND THE SUBSEQUENT ISSUANCE OF A COMPLAINT BY THE REGIONAL DIRECTOR, ACTS WHICH WERE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND BEYOND THE JURISDICTION OF THE REGIONAL DIRECTOR. IN SO DOING THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER CONFLICTING WITH A DECISION OF THIS COURT AND SANCTIONED ADMINISTRATIVE ACTIVITY SO FAR DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF BOARD PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

Company is unable to add to the succinct argument on these points in the petition filed by Union. Therefore, Company adopts and urges the argument presented by Union on pages 7 to 14 of its petition.

II

THE DECISION AND ORDER OF THE BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

Company is unable to add to the succinct argument on this point in the petition filed by Union. Therefore, Company adopts and urges the argument presented by Union on pages 14 to 16 of its brief.

III

THE COURT OF APPEALS HAS SANCTIONED A REMEDY BY THE BOARD WHICH HAS NO PRECEDENT IN LAW, DEPRIVES COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, UNJUSTLY ENRICHES UNION, DOES NOT EFFECTUATE ANY POLICIES OF THE ACT, AND CONSTITUTES A PENALTY.

Company concedes that the hiring practices followed by it prior to September, 1963, amounted to an inadvertent violation of the Act. However, the evidence in the record is uncontradicted that Company immediately corrected the matter when it was called to its attention. Nevertheless, the Board held Company jointly and severally liable with Union for reimbursement of dues collected despite the fact that Company had paid all of such dues to Union and Union is a financially responsible organization.

The Court of Appeals remarked that it was "not unsympathetic" with Company's contention that its liability for reimbursement of the dues should have been limited to secondary responsibility.

> "We are not unsympathetic with the Company's position and certainly the Board could have provided secondary reponsibility had it so chosen". (Appendix A, p. vi.)

The Court then proceeded to declare that the Board had discretion to provide such a remedy when both the Union and employer had engaged in "the discriminatory practice". (Appendix A, p. vi.) However, each of the cases cited by the Court of Appeals involved illegal discharges and the remedy for joint and

several liability for back pay in such cases is specifically authorized by Section 10(c) of the Act.

The remedy by the Board in the instant case is not specifically authorized by the Act. The only statutory authority for the Board's remedy in this case is found in Section 10(c) of the Act wherein it is provided that if the Board finds that a violation of the Act has been committed, it must state its findings of fact and issue an order requiring the person to cease and desist from the unfair labor practice, "and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act; provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . .".

Since the Act does not specifically provide for joint and several liability for reimbursement of dues, the action of the Board cannot be sustained unless it can be viewed as effectuating the policies of the Act.

The policies to be effectuated are stated in Sec. 1 of the Act, as follows:

> "Section 1. The denial by some employers of *the right of employees to organize* and *the refusal by some employers to accept the procedure of collective bargaining* lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the

current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The *inequality of bargaining power between employees* who do not possess full freedom of association or actual liberty of contract, *and employers who are organized in the corporate or other forms of ownership association* substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their

officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (29 USCA 151.)"

This statute clearly sets forth the basic policies of the Act which are the encouragement of the practice and procedure of collective bargaining and the protection of the freedom of employees to organize and be represented by representatives of their own choosing.

The remedy here has nothing to do with implementing these policies. The record shows Company has done nothing to interfere with or hinder its employees in the exercise of their rights under the Act. To the contrary, Company has recognized Union as the

bargaining agent for its employees for many years and has freely and fairly entered into negotiations and contracts over a long period of time.

Company has been unable to discover a single precedent for the Board's remedy in this type of case and the Court of Appeals failed to cite any cases in point in sanctioning the remedy. Company contends that since the remedy cannot fairly be said to effectuate any purposes of the Act, it can be viewed only as an unlawful punitive measure against Company.

This Court has held that the remedy of the Board to undo the effects of unfair labor practices will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*The Virginia Elec. and Power Co. v. National Labor Relations Board,* 319 U.S. 533, 540 (1942); 63 S. Ct. 1214, 87 L. ed. 1568; *Fibreboard Paper Products Corp. v. National Labor Relations Board,* 379 U.S. 203, 216 (1964), 85 S. Ct. 398, 13 L. ed. 2d 233.)

With reference to the Board's duty to command affirmative action which is remedial, not punitive, this Court has construed the meaning of Section 10(c) of the Act in the following language:

> "This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think

would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Company v. National Labor Relations Board,* 305 U.S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines,* 303 U.S. 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." (*Republic Steel Corp. v. National Labor Relations Board,* 311 U.S. 7, 11, 12 (1940), 60 S. Ct. 806, 85 L. ed. 6.)

In a quite recent case, the Circuit Court for the District of Columbia Circuit, stated:

"We find it difficult to see genuine meaning in a 'remedy' which is essentially negative in character and smacks of punitive action." (*International Ladies Garment Workers Union v. NLRB,* 54 Labor Cases, para. 11664 (1967).)

The evidence in the record shows that no money was ever deducted from an employee's paycheck for

the benefit of the employer. All deductions were for Union and were paid to Union. Union has retained possession of the monies, and is a financially responsible organization.

It would be a denial of due process and most unfair to require Company to pay to employees monies it collected for Union, paid to it, retained by it, and which it is well able to repay. If there is to be reimbursement of the dues collected as specified in the remedy, if such reimbursement has anything to do with the effectuation of the purposes of the Act, then that reimbursement must be from Union which has in its possession the funds so collected. To require Company to pay this money would be the imposition of a penalty rather than a remedy to effectuate the purposes of the Act, and constitute taking of property without due process of law.

Here there was joint action, but only Union benefited financially thereby. If Company is required to reimburse employees for dues collected for, paid to, and retained by Union, Union will be unjustly enriched, and Company will be paying for deductions from which it derived no benefit. This result would accomplish only an unauthorized punishment of Company, rather than constituting a remedial action to effectuate the purposes of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the writ of this Court be issued.

Dated, Sacramento, California,
August 15, 1967.

Respectfully submitted,
ROBERT G. CALDER, JR.,
GILFORD G. ROWLAND,
Attorneys for Petitioner
Campbell Soup Company.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Campbell Soup Company and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Respondents.	No. 21,297

[May 23, 1967]

On Petition to Enforce an Order of the
National Labor Relations Board

Before: Merrill and Browning, Circuit Judges, and Taylor, District Judge

Merrill, Circuit Judge:

This case is before the court upon petition of the National Labor Relations Board to enforce its order issued against respondents on June 16, 1965, following proceedings under §10(c) of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.* The Board's decision and order are reported at 152 N.L.R.B. 1645 (1965).

The Board found that respondent company, by requiring newly hired employees to join respondent union immediately, as a condition of employment, by furnishing new employees with union cards, by deducting union dues and initiation fees from the employees' pay during the first thirty days of employment[1] and forwarding these deductions to the union, thereby assisted the union in violation of §8(a)(2) and (1) of the Act. The Board found that the company and the union, by jointly engaging in a practice whereby newly hired employees were required to join the union and pay union dues and initiation fees during the first thirty days of employment, violated §8(a)(1), (2) and (3), and §8(b)(2) and (1)(A) of the Act.

The Board's order directs respondents to cease and desist from checking off union dues for employees pursuant to membership dues checkoff authorizations, unlawfully obtained from the employees prior to the thirty-day statutory period, and from in any like or related manner interfering with employees in the exercise of their §7 rights, and to post the usual notices. The Board further ordered respondents, jointly and severally, to reimburse all employees hired within six months[2] prior to the time the charge was filed in this case for their first month's dues, and to reimburse those employees who, during the same period, paid

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[1] §8(a)(3) permits an employer, pursuant to agreement with a union, to require union membership "after the thirtieth day following the beginning of such employment."

[2] 29 U.S.C. §160(b) (1964) precludes a Board complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

initiation fees but worked less than thirty days for the initiation fees so deducted.

The union challenges the Board's finding of an unfair labor practice, asserting that the newly hired employees voluntarily joined. In our judgment the Board's finding is supported by substantial evidence.

The union's main attack is upon the Board's order that reimbursement apply to all employees hired within the time limits specified in the order. It contends that the remedy of reimbursement should be limited to the one employee who filed the unfair labor practice charge with the Board.

The union first contends that the charges filed were not broad enough to encompass any conduct other than that which occurred in the case of the charging individual. We do not so read the charges. They were that "Madeline Ritchey and others" had been "required" or "caused" to become members of the union as a condition of employment, and that "by these and other acts" respondents had "coerced and restrained employees" in violation of §7 of the Act.

The union's principal contention is that the order is contrary to an agreement of settlement reached by the Board and the union, which limited reimbursement to Madeline Ritchey. There is no question but that such was the nature of the agreement as proposed by the Board's field examiner and acceded to by the union, and that this proposal was the express subject of an exchange of correspondence. The trial examiner found that an agreement had been reached.

The Board's ruling to the contrary was based upon the fact that the agreement had not been approved in writing by the Board's regional director, but instead had been rejected by him for the reason that without extending reimbursement to all those ultimately covered by the Board's order, a complete remedy for the unfair labor practice would not be provided.

The field examiner, in forwarding a copy of his proposed settlement agreement, had stated that it was being recommended by him "subject to the approval of the regional director." Settlement agreements are the subject of NLRB Statement of Procedure §101.7, which expressly states that agreements are "subject to the approval of the regional director."

The union vigorously contends that it is unwise to stand upon the requirement of approval and to construe that requirement as for approval in writing. It echoes the views of the trial examiner, who ruled that the proposed agreement should bind the Board; he reasoned that a contrary rule would impart an undesirable degree of uncertainty to settlement negotiations and discourage negotiation in the field.

The Board, however, found other considerations to be more impelling. It stated:

> "We reject the trial examiner's conclusion that there are 'any number of ways' in which the regional director can give his approval to a settlement agreement. In our opinion it is necessary that the regional director expressly approve in writing the offered settlement in its totality after

all disputed issues are resolved. Anything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effiectuated, as in the instant case."

Such policy decisions clearly are within the broad discretion of the Board.[3] The question here relates to the wisdom of the rule in the public interest rather than to the injustice of strict construction in a particular case. Further we do not find here a completely arbitrary departure from settled administrative practice, such as has been felt to warrant judicial intervention. *Cf., Sunbeam Television Corp. v. FCC,* 243 F.2d 26 (D.C. Cir. 1957).[4]

The company attack on the Board's order is directed to the fact that the company has been made responsible for reimbursement jointly and severally

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[3]"Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).

[4]The Board itself, in past cases, has recognized the policy considerations noted by the trial examiner, but the force given to them has depended on the circumstances of the particular case. *Sherry & Gordon Co.,* 107 N.L.R.B. 113 (1953); see also *United Dairy Co.,* 146 N.L.R.B. 187 (1964); *Tomkin Motor Lines, Inc.,* 142 N.L.R.B. 1 (1963); *Jackson Mfg. Co.,* 129 N.L.R.B. 460 (1960); *Corn Products Refining Co.,* 22 N.L.R.B. 824 (1940); *Wickwire Bros.,* 16 N.L.R.B. 316 (1939); *Godchaux Sugars, Inc.,* 12 N.L.R.B. 568 (1939); *Shenandoah-Dives Mining Co.,* 11 N.L.R.B. 885 (1939). All prior cases are distinguishable from the case before us, and we disagree with the union's contention that there existed any established rule contrary to that here announced. Arbitrary disregard of this rule in the future would present a different question. See *Burinskas v. NLRB,* 357 F.2d 822 (D.C. Cir. 1966).

with the union. It should instead, it contends, have been made secondarily responsible. The present order, it asserts, may well result in unjust enrichment of the union, and to permit the union thus to enrich itself can hardly be said to accomplish the purposes of the Act.

We are not unsympathetic with the company's position and certainly the Board could have provided secondary responsibility had it so chosen. The choice, however, remains that of the Board, and it is clear that the choice of joint and several liability is available to the Board when both the union and the employer had engaged in the discriminatory practice. *NLRB v. Newspaper and Mail Deliverers Union,* 192 F.2d 654 (2d Cir. 1951); *Union Starch and Refining Company v. NLRB,* 186 F.2d 1008 (7th Cir. 1951), *cert. denied,* 342 U.S. 815 (1951); also *cf., NLRB v. Pinkerton National Detective Agency,* 202 F.2d 230 (9th Cir. 1953). We would have a different case if the company had strongly resisted the imposition of this practice by the union. See *NLRB v. Lexington Elec. Products Co.,* 283 F.2d 54 (3d Cir. 1960).

The order is entitled to enforcement. So ordered.

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Campbell Soup Company and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Respondents.	No. 21,297

DECREE

Before: Merrill and Browning, Circuit Judges, and Taylor, District Judge:

This Cause came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondent, Campbell Soup Company, Modesto, California, its officers, agents, successors and assigns and Respondent, Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, its officers, agents, and representatives on June 16, 1965. The Court heard argument of respective counsel on April 10, 1967, and has considered the briefs and transcript of record filed in this cause. On May 23, 1967, the Court being fully advised in the premises, handed down its decision granting enforce-

ment of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Ninth Circuit that:

A. The Respondent, Campbell Soup Company, Modesto, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Contributing support to Butchers Union Local No. 127, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), or any labor organization, by its practice of informing prospective and/or newly-hired employees of the requirement that employees must join the Union immediately, furnishing prospective employees with application for membership cards and initiation fees and dues checkoff authorizations, and deducting the said dues and initiation fees and paying the same over to the said Union, prior to the 30-day statutory grace period following employment.

(b) Requiring prospective or newly-hired employees to execute membership-dues-checkoff authorization cards for the aforementioned Union, or any other labor organization, prior to the expiration of the 30-day grace period provided for in Section 8(a)(3) of the National Labor Relations Act, as amended, (hereinafter called the Act).

(c) Checking off union dues for employees pursuant to membership-dues-checkoff authorzations unlawfully obtained from employees prior to the 30-day statutory period.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the aforesaid Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Jointly and severally with the Respondent Union, reimburse all employees for moneys illegally exacted from them, in the manner and to the extent set forth in the section of the Board's Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to determine the amount of the moneys illegally exacted from the employees involved.

(c) Post at its plant in Modesto, California, copies of the attached notice marked "Appendix A." Copies of such notice, to be furnished by the Regional Director for Region 20, (San Francisco, California) shall, after being duly signed by its authorized representative, be posted by the Respondent Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in (c) above, and as soon as they are forwarded by the aforesaid Regional Director, copies of the Respondent Union's notice herein marked "Appendix B".

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent Company has taken to comply herewith.

B. The Respondent, Butchers Union Local No. 127, Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause the Respondent Company to discriminate against prospective and/or newly hired employees by requiring them to execute membership-dues-checkoff authorizations for

the above-named Union, or any other labor organization, prior to the expiration of the 30-day grace period provided for in Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act.

(a) Jointly and severally with the Respondent Company, reimburse all employees for moneys illegally exacted from them, in the manner and to the extent set forth in the section of the Board's Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all membership, dues, and other records necessary to compute the moneys illegally exacted from the employees involved.

(c) Post at its business offices and meeting halls in Stockton, California, copies of the attached notice marked "Appendix B." Copies of said notice, to be furnished by the said Regional Director, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt

thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(d) Mail to the said Regional Director signed copies of Appendix B for posting by Respondent Company at its Modesto, California, plant, as provided above. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by Respondent Union's representative, be forthwith returned to the said Regional Director for disposition by him.

(e) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps it has taken to comply herewith.

Endorsed, Decree Filed and Entered

/s/ Wm. B. Luck
Wm. B. Luck
Clerk

[A True Copy
Attest:
Wm. B. Luck
Clerk]

Appendix B

NATIONAL LABOR RELATIONS ACT, AS AMENDED

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition

of employment to encourage or discourage membership in any labor organization: Provided, That nothing in his Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons

other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Appendix C

ADMINISTRATIVE PROCEDURE ACT, TITLE 5, U.S.C.A.

Sec. 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Sec. 557(c)

"(a) . . .

(b) . . .

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) Findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof."

Appendix D

NATIONAL LABOR RELATIONS BOARD
STATEMENT OF PROCEDURE

Sec. 101.7. *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

NATIONAL LABOR RELATIONS BOARD
RULES AND REGULATIONS

Sec. 102.45 *Trial examiner's decision; contents; service; transfer of case to the Board; contents of*

record in case.—(a) After hearing for the purpose of taking evidence upon a complaint, the trial examiner shall prepare a decision. Such decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act. The trial examiner shall file the original of his decision with the Board and cause a copy thereof to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, on all the parties. Service of the trial examiner's decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the trial examiner's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

Appendix E

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

August 23, 1963

Charles P. Scully, Esq.
Suite 1108-1120 David Hewes Bldg.
995 Market Street
San Francisco 3, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Sir:

In accordance with telephone conversations this date with the parties, I am enclosing copies of the proposed Settlement Agreement and Notice for your perusal and signature. I want to note that the proposed Settlement Agreement is based upon my opinion and is being recommended by me subject to the approval of the Regional Director.

The Charging Party, Mrs. Ritchey, worked more than 30 days (4-18 to 6-3-63) and therefore, in accordance with *Cadillac Wire Corp.*, et al. *128 NLRB 1002,* where there is a lawful union-security clause, would not be entitled to a refund of her initiation fee,

but is entitled to a refund of the amount of her first month's dues—$4.00—which was deducted on 5-5-63.

Although there is some evidence indicating that there may be other employees or former employees who might be entitled to participate in the remedy called for in this case, please note that the Settlement Agreement, as proposed, when agreed to contemplates extension of the remedy only to the Charging Party. Please sign and date the original and one copy and mail them to this office by *Tuesday, September 3, 1963.* A self-addressed, postage paid, envelope is enclosed for your convenience. Absent a Settlement Agreement in this case, I will recommend on *9-4-63* that a complaint issue.

Thank you for your cooperation. If you have any questions concerning this matter, please contact me immediately.

Very truly yours,
/s/ Dean H. Francis
Dean H. Francis
Field Examiner

Encl:
(Emphasis added).

August 26, 1963

Mr. Dean H. Francis
Field Examiner
National Labor Relations Board
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

This will acknowledge your letter of August 23, 1963 and the enclosed Settlement Agreement with respect to the above matter.

In your letter you indicate the possibility of other employees being involved, but do not disclose their identity by name. As far as I am concerned, however, I believe this is immaterial because it is my understanding that upon the execution of this Settlement Agreement, there will be no claimed violation with respect to any employees employed up to the time of the execution of the settlement. If I am in error in this respect, I would appreciate being advised since, as you know, it is our position that the Union in no way caused or required the form to be signed by the employees and the form was presented to them by the employer but not as the agent of the Union.

I have forwarded the documents to my clients for their consideration and if satisfactory, I assume they

will sign and return them to me in the immediate future, at which time I will then forward them to you. *I do, however, have some concern with the third paragraph of the notice which would indicate an admission of illegal conduct in contradiction of the disclaimer in the Settlement Agreement itself. It would be my suggestion that you would consider the rewording of that, so as to remove any concept of admitted illegality.* In addition, it would appear that the reference to the 3-day in the last line of the first paragraph may be a typographical error also.

Very truly yours,
Charles P. Scully.

CPS:mb
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo
(Emphasis added).

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

August 27, 1963

Charles P. Scully, Esq.
Suite 1108-1120 David Hewes Bldg.
995 Market Street
San Francisco 3, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Sir:

Enclosed you will find a copy of Form NLRB 4031 Notice to all Members. Please substitute this Notice for the one sent to you on August 23, 1963. You will note that the typographical error in the last line of the first paragraph referring to a "3-day" grace period is corrected to read "30-day." Thank you for your letter of August 26, 1963 noting the error.

In connection with the suggestion in your August 26, 1963 letter, concerning the possibility of rewording the last paragraph of the Notice to remove the inference of legality, I do not feel the Regional Director will object to dropping the word "illegal." *You will note, therefore, that the paragraph has been reworded and the offending word "illegal" deleted.*

Your understanding, as expressed in your letter of August 26, that upon the execution of this Settlement Agreement there will be no claimed violation with respect to any employees employed up to the time of the expiration of the settlement is correct.

Very truly yours,
Dean H. Francis /s/
Dean H. Francis
Field Examiner

Encl:
(Emphasis added).

August 28, 1963

Mr. R. Lautermilch, Secretary
Butchers Union Local No. 127
1024 Bank of America Bldg.
Stockton, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Lautermilch:

Enclosed you will find a revised NOTICE TO ALL MEMBERS which should be signed and returned to us, *since in view of the accompanying letter from Mr. Francis to me, a copy of which is enclosed, I believe you will see that it is a final and complete determination as to all pending disputes and simply involves the repayment of one month's dues.*

I suggest, however, that in the 5th line of the first paragraph, you insert a zero after the numeral "3" so that it appears "30 days" and initial that on the margin opposite the correction.

If you have any questions, please contact me.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: *Messrs. Dean Francis*
Max J. Osslo
SF Office
(Emphasis added)

August 28, 1963

Mr. Dean H. Francis
Field Examiner
National Labor Relations Board
Twentieth Region
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

I am forwarding the signed Settlement Agreement and duplicate copy to you herewith, so that you may proceed, and you will note by attached copy of letter to Mr. Lautermilch that I have forwarded the amended Notice to him for execution.

Immediately upon the return of the signed Notice, it will be forwarded to you.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo

August 30, 1963

Mr. Dean H. Francis
National Labor Relations Board
830 Market Street
San Francisco 2, California

Re: Amalgamated Meat Cutters & Butcher Workmen of North America, Local 127
Case No. 20-CB-1116
(c Campbell Soup Company
20-CA-2780)

Dear Mr. Francis:

Enclosed you will find the executed copy of Notice in the above matter, which is being transmitted in accordance with the understanding contained in your letter of August 23, 1963.

You will note that we have made the corrections in the first paragraph and assume this is satisfactory.

If there is anything further to be done please advise.

Very truly yours,
Charles P. Scully.

CPS:mb
Enc.
OPE 3-AFL-CIO
cc: Messrs. Lautermilch, SF & Stockton
Osslo
(Emphasis added).

(Letterhead of
National Labor Relations Board
Twentieth Region
830 Market Street, San Francisco 2, California)

September 20, 1963

Mrs. Madeline Ritchey
1025 Conejo
Modesto, California

Campbell Soup Company
375 Memorial Avenue
Camden, New Jersey
Attn: D. H. Springer

Charles P. Scully, Esq.
Suite 1108-1120
David Hewes Building
995 Market
San Francisco 3, California
Attn: Victor Van Bourg, Esq.

Re: Campbell Soup Company
Case No. 20-CA-2780
Amalgamated Meat Cutters
and Butcher Workmen of
North America, Local 127
Case No. 20-CB-1116

Dear Madame and Gentlemen:

Additional matters relating to the above cases *have been brought to our attention.* The settlement proposal

previously submitted is withdrawn and further investigation will be made.

If you have any questions concerning this matter, please call or write.

Very truly yours,
Dean H. Francis /s/
Dean H. Francis
Field Examiner

(Emphasis added).

October 1, 1963

National Labor Relations Board
Twentieth Region
830 Market Street
San Francisco 2, California

Attention Mr. Dean H. Francis
Field Examiner

Re

Campbell Soup Company—No. 20-CA-2780—and
Amalgamated Meat Cutters and Butcher Workmen
of North America, Local 127—No. 20-CB-1116

Dear Mr. Francis:

This will acknowledge receipt of your letter dated September 26, 1963, enclosing a revised settlement agreement and notice.

As we have previously indicated to you in rather certain terms, we will not recommend such a settlement to our clients, and believe that any settlement should run only towards the charging party and towards no other person, particularly since we are dealing with the question of a subjective state of mind on the issue of voluntariness.

Accordingly, unless we can have a reconsideration of the original settlement agreement already agreed to by our principals, we can see no choice but to proceed with litigation in this case.

Very truly yours,
Charles P. Scully
By Victor Van Bourg

VVB:cb
OPE-3-afl-cio
cc: Messrs. Osslo
Lautermilch
(SF and Stockton)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 525

CAMPBELL SOUP COMPANY and BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This is a companion case to *Butchers Union Local No. 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *National Labor Relations Board*, No. 439, this Term, pending on the Union's petition for certiorari. The cases involve the same Board order and court of appeals judgment.

As explained in greater detail in the Board's brief in opposition in No. 439, the Company, in agreement

with the Union, required newly hired employees to join the Union and deducted union dues and initiation fees from their wages, all prior to the 30-day grace period provided by the Act. The Board found that by engaging in such conduct the Company and Union discriminated against the employees in violation of Sections 8(a)(3) and (1), and 8(b)(2) and (1)(A) of the Act, and that the Company further violated Section 8(a)(2) by unlawfully assisting the Union. Accordingly, the Board ordered the Company and Union to cease and desist from such unfair labor practices and to reimburse the employees for the unlawfully deducted dues and initiation fees; it made the Company's and Union's reimbursement obligation joint and several. The court of appeals sustained the Board's findings and enforced its order in full.

The only question raised by the Company here, which was not raised by the Union in No. 439, is whether the Board properly ordered the Company, jointly and severally with the Union, to make the discriminatees whole for the dues and initiation fees unlawfully deducted by the Company and forwarded to the Union. The court of appeals correctly held, we submit, that the choice of this remedy, rather than one imposing sole or primary liability upon the Union, is within the Board's discretion [1] where, as is "conceded"

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[1] This Court has made clear that the task of devising remedies to effectuate the policies of the Act is a "broad discretionary one" which Congress has entrusted to the Board, subject to limited judicial review. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

by the Company here (Pet. 5, 11), "both the union and the employer had engaged in the discriminatory practice" (Pet. App. vi). Accord: *National Labor Relations Board* v. *Cadillac Wire Corp. and Local 810, Teamsters*, 290 F. 2d 261 (C.A. 2), enforcing, 128 NLRB 1002. Contrary to the Company's contention, the Board's order is not punitive. As this Court held in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 544, where the employer also unlawfully deducted dues from the employees wages and forwarded the monies to the union:

> The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the [union unlawfully assisted by Company] to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act. This is not a case in which the Board has ordered the payment of sums to third parties [as in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, erroneously relied upon by the Company here (Pet. 9-10)].

For the foregoing reasons and those set forth in our brief in opposition in No. 439, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

SEPTEMBER 1967

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 274725 186